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No. 1110

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

MARVIN PHILLIPS,

Petitioner,

No. 32357 vs.

THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES, EVELLE J. YOUNGER, District Attorney for the County of Los Angeles, and JOHN W. MINER, Deputy District Attorney,

Respondents.

MARVIN PHILLIPS,

Petitioner,

No. 32419 vs.

THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES, HON. ARTHUR L. ALARCON, EVELLE J. YOUNGER, District Attorney for the County of Los Angeles, JOHN W. MINER, Deputy District Attorney, and CHARLES GESSLER, Public Defender,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

Petitioner prays that a Writ of Certiorari issue to review to final orders of the Supreme Court of the State of

California made and entered in that Court on November 22, 1967, which denied petitions for hearing (R. 40, Case No. 32357, and R. 32, Case No. 32419) to review one order of the Court of Appeal of the State of California, Second Appellate District (R. 39, Case No. 32357) made and entered in that Court on October 24, 1967, which denied without opinion or requiring the respondents to answer, a verified petition for a Writ of Prohibition (R. 28-36, Case No. 32357), and another order made and entered in that Court November 9, 1967, which also denied a petition for a Writ of Prohibition (R. 31, Case No. 32419).

OPINIONS BELOW

Neither the Supreme Court of the State of California or the Court of Appeal, Second Appellate District, rendered any opinion in either case.

JURISDICTION

The orders of the Supreme Court of California denying the petitions for hearings were both entered on November 22, 1967 (R. 40, Case No. 32357; R. 32, Case No. 32419). The jurisdiction of this Court is invoked under 28 U.S.C., section 1257 (3). The first petition for a Writ of Prohibition in Case No. 32357 raised the jurisdictional question as to whether, under the facts involved, the petitioner could be made "subject for the same offence to be twice put in jeopardy," in the light of the provision of the Federal Constitution, Fifth Amendment, and in the light of Article 1, section 13, of the Constitution of the State of California. The question was properly raised under California law by Petition for Writ of Prohibition. *Gomez* v. *Superior Court,* 50 Cal. 2d 640; *Jackson* v. *Superior Court,* 10 Cal. 2d 350, and was timely as no second trial had yet commenced when

the petition was filed. The second Petition for a Writ of Prohibition, Case No. 32419, raised the question as to whether the Superior Court of the State of California had jurisdiction under the Federal Constitution to compel the petitioner to stand trial for the crime of murder with the Public Defender, under the protest of the petitioner, the Public Defender, and counsel of the petitioner's own choosing and which petitioner had already retained to conduct such trial if he had to go on trial at all, should the final determination of the courts so rule (Constitution of United States, Amendments 6, 14; *Johnson* v. *Zerbst,* 304 U.S. 458; *Powell* v. *Alabama,* 287 U.S. 45; *Glasser* v. *United States,* 315 U.S. .....; *Gideon* v. *Wainwright,* 372 U.S. 335).

QUESTIONS INVOLVED

1. Whether it was the original purpose of the Fourteenth Amendment to extend to all the nation the complete protection of the Bill of Rights, and that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment, and if, on this principle, *Palko* v. *Connecticut,* 302 U.S. 319, and *Hoag* v. *New Jersey,* 356 U.S. 464, should be overruled.

2. Whether a double prosecution, on the facts here, much more aggravated than in *Green* v. *United States,* 355 U.S. 184, for the same offence are so contrary to the spirit of our free country that it violates even the prevailing view of the Fourteenth Amendment, expressed in *Palko* v. *Connecticut,* 302 U.S. 319.

3. Whether a trial court can compel a defendant to accept as counsel the Public Defender while such defendant has regularly retained counsel of his own choosing to protect his rights when charged with the crime of murder.

4. Whether, in the light of the desperate predicament with which this petitioner was confronted, and without the advice of counsel of his own choosing, as to whether he should or should not take the stand in his own defense in the light of the provision in the California Constitution that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury," this provision in Article 1, section 13, of the California Constitution is repugnant to the Fifth and Fourteenth Amendments of the Constitution of the United States, and that *Adamson* v. *California*, 332 U.S. 46, and *Twining* v. *New Jersey*, 211 U.S. 78, should be overruled.

STATEMENT

On September 4, 1962, the petitioner was found guilty by a jury in the Superior Court for the County of Los Angeles of the crime of murder in the second degree, and on October 3, 1962, he was sentenced to a term of imprisonment in the state prison of from five years to life (R. 32-33, Case No. 32357). The conviction was had on the felony murder doctrine, the felony being Grand Theft. There was no count in the indictment charging Grand Theft, nor did the indictment give any notice that the felony of Grand Theft would be used to secure a conviction on the felony murder doctrine. On appeal the judgment was reversed by the Supreme Court of California on May 23, 1966, on the grounds that the felony of Grand Theft, a crime not inherently dangerous, could not be used to sustain a prosecution under the felony murder doctrine. *People* v. *Phillips*, 51 Cal. Rptr. 225 (R. 34-35, Case No. 32357). The Supreme Court did not order a new trial.

At the commencement of the first trial, the prosecution abandoned any case as to murder in the first degree (R. 35, Case No. 32357). On motion of defense and allowed by the trial court, the court abandoned the case as to any degree of manslaughter and no charge as to first or second degree manslaughter was submitted to the jury (R. 31, Case No. 32357). Undertaking to forbear to proceed further with the charge of murder in the first degree, or to manslaughter in any degree was the equivalent to a *nolle prosequi* of these elements of homicide (R. 31, Case No. 32357). On this basis the case was presented to the jury solely on the doctrine of felony murder, and the jury was bound by the conclusive presumption of the felony murder rule (R. 30, Case No. 32357). Motion for a directed acquittal was denied (R. 32, Case No. 32357).

When, after the reversal of the judgment by the Supreme Court of California, it appeared that the prosecution intended to place the petitioner twice in jeopardy for the same offense, the petitioner sought an attorney to challenge the jurisdiction of the court on the grounds that any new trial would be in violation of the State Constitution, Article 1, section 13, and in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States, or if he must go on trial, to defend him. The petitioner had been so impoverished by the expenses of the first trial and the subsequent appeal that this was a difficult task as he could not raise the enormous funds demanded by attorneys because the case was extremely complicated (R. 2, Case No. 32419). Two or three attorneys became involved but all backed out because sufficient funds were not forthcoming. Thirteen continuances were had, but nine of these continuances were by the deputy district attorney and the court for and on their own behalf. Four continuances

were granted the petitioner over a period of a year. Three of these continuances were granted to allow counsel to withdraw from the case. In sheer desperation and as a last resort, petitioner accepted the services of the Public Defender, but he kept up his search for counsel of his own choice, especially when the Public Defender told the petitioner he would be unable to procure any medical doctors to testify as expert witnesses, and such expert testimony was vital to the case.

The petitioner is a chiropractor duly licensed to practice in the State of California, but as in the former trial his guilt or innocence of the crime of murder would not depend on the testimony of members of his school of medicine. The outcome entirely depended on the expert testimony of witnesses in orthodox medicine, and would be based on opinions only, and not facts. No attorney with whom he discussed his case could furnish such expert testimony because of the fact that orthodox medicine classifies the profession of chiropractic as "an unscientific cult whose practitioners lack the necessary training and background to diagnose and treat human disease." And that "chiropractic constitutes a hazard to rational health care in the United States." (Journal of the American Medical Association, Vol. 200 p. 130, April 17, 1967). This situation was aggravated by the fact of a world-wide claim by the deputy district attorney who conducted the first trial, and was going to conduct the second one, that "The theory of chiropractic is a notion that no self-respecting witch doctor in deepest Africa would entertain." (R. 21, Case No. 32419). Finally the petitioner procured counsel of his own choosing through the Scientific Research and Civil Rights Foundation in the State of Illinois. The Foundation immediately furnished the petitioner with counsel of his own

choosing, and guaranteed that medical doctors would be available as expert witnesses if a trial must be had. Two Los Angeles attorneys were retained to look into the facts and the law of the case, Irving D. Apple and Victor Dobrin.

On September 5, 1967, Mr. Dobrin appeared in behalf of the petitioner before the Superior Court and asked for a continuance in order to file a petition and brief in support thereof with the Court of Appeal, Second Judicial District for a Writ of Prohibition to test the jurisdiction of the Superior Court as to whether under the Constitution of California and the Constitution of the United States any new trial could be had. The motion for a continuance was denied, but the case was continued because of the fact that the Court was going to attend a Bar Association Convention in California and October 23, 1967 was set as the date of trial (R. 3, 4, Case 32419).

After much factual and legal investigation Messrs. Apple and Dobrin, filed a petition for a writ of prohibition and a brief of 80 pages in support thereof in the Court of Appeal, Second Appellate District (R. 26-36, Case No. 32357). An additional attorney was added in behalf of the petitioner, a Mr. Charles L. Abrahams, also from Los Angeles. While the petition for the writ of prohibition was pending, and on October 23, 1967, Mr. Abrahams appeared before the trial court and asked the court to continue the case until the petition for the writ of prohibition was finally disposed of in the appellate courts (App. pp. 1-4). At the same time the petitioner asked the trial court to substitute Mr. Abrahams as the trial attorney (App. p. 4). Petitioner was told to renew the motion before Judge Alarcon. On the same date, the motion was renewed, and again the petitioner asked Judge Alarcon to substitute the Public Defender with Mr. Abrahams as trial counsel (App.

p. 7). The motion was denied (App. p. 8). The case was continued because another trial was in progress. A written motion for continuance and substitution was also filed on this date (R. 36-37, Case No. 32357). This motion was denied.

The matter again came before Judge Alarcon on October 31, 1967 as no trial had yet commenced. On this occasion the Public Defender moved the trial court that he be relieved in the case and Mr. Abrahams substituted on the grounds that the Public Defender had no jurisdiction to try the case as petitioner had counsel of his own choosing (App. pp. 13-15). The motion was denied (App. p. 19). Another motion for continuance because of the pending proceedings for prohibition was made. This was also denied (App. pp. 19-20).

On October 24, 1967, the Court of Appeals denied the petition for writ of prohibition and a temporary stay (R. 39, Case No. 32357). Mr. Abrahams immediately filed another petition for writ of prohibition in the Court of Appeals on the ground that the Superior Court had lost jurisdiction by denying the petitioner counsel of his choice and compelling him to stand trial for murder with the Public Defender (R. 19-27, Case No. 32419). The petition for prohibition and a stay were denied (R. 19-27, 28-30, Case No. 32419). Both petitions were denied on November 9, 1967 (R. 31, Case No. 32419). Petition for hearings in the Supreme Court of California were denied on November 22, 1967. Meanwhile another attorney was added in behalf of the petitioner, Mr. Frank O. Walther, Haverford, Pennsylvania. Mr. Walther accompanied by Mr. Charles L. Abrahams went to the Supreme Court in Washington asking for an order staying any further proceedings in the criminal trial of petitioner in the Superior Court in Los

Angeles. Mr. Justice William O. Douglas denied the stay after the jury had rendered its verdict of guilty of murder in the second degree. The trial had been already well under way when this application was made.

When the People had completed their case, and on November 16, 1967, the deputy district attorney admitted that the petitioner was being tried under protest in that he was denied counsel of his own choosing. At this time he had been furnished with not less than four able attorneys all working in cooperation in his behalf. On this date the matter came up as to whether the petitioner should take the stand in his own defense or refuse to testify in the light of the California constitutional provision that his failure to so do could be used to incriminate him. (App. pp. 23-32). The petitioner stated he did not know what to do because "I don't know what Mr. Abrahams would have done had I had him for counsel" (App. p. 31). This decision would have been less difficult had the petitioner been allowed counsel of his own choosing as such counsel was in the position to furnish expert testimony of medical doctors in his behalf, but was not available when counsel of his own choosing was denied him. The situation was aggravated because of the fact that under California rule private counsel is not allowed to associate themselves actively in a criminal trial where the Public Defender is conducting the case. *People* v. *Mattson,* 336 P. 2d 937; *People* v. *Saltz,* 131 Cal. App. 2d 459; *People* v. *Kerfoot,* 184 Cal. App. 622; *People* v. *Lanigan,* 22 Cal. 2d 569. The jury returned a verdict of murder in the second degree.

On December 21, 1967, Mr. Abrahams again appeared before Judge Alarcon in the Superior Court and filed a motion to arrest the judgment on the grounds that the Court had no jurisdiction to proceed with the trial in the

first place, and that to do so violated the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and that no judgment should be pronounced until the two actions for writs of prohibition were disposed of by the Supreme Court of the United States. After a long discussion the motion was denied and the case continued until January 2, 1968 to give the Public Defender time to prepare a motion for a new trial. (App. pp. 35-43).

On January 2, 1968, the Public Defender, himself, made a motion somewhat similar to that presented by Mr. Abrahams on December 21, 1967, that the motion was "somewhat in form of an arrest in judgment * * * it does go to the jurisdiction of the court by writ of prohibition and therefore would seem to fall within the spirit of an arrest of judgment motion, either as an arrest of judgment motion or as a motion to continue proceedings until such time as the writ was filed with the Supreme Court (App. A, pp. 1-3). The Court said in denying the motion as follows:

> "The Court: Mr. Gessler, if this Court has no jurisdiction to proceed, or had no jurisdiction up to this point, it would have no jurisdiction to sentence the defendant and therefore the Court's order sentencing the defendant would also be a matter which could be interfered with by the U.S. Supreme Court on the 15th (January 1968); isn't that correct?
>
> * * *
>
> "The Court: If that is true, that this Court had no jurisdiction to entertain his trial, then this Court has no jurisdiction now.
>
> * * *
>
> "The Court: If it is true that the State Court of California has no jurisdiction to proceed in this matter, then the U.S. Supreme Court can act in granting a writ of certiorari whether I sentence the defendant today or not, since I have no jurisdiction if the defendant is correct.
>
> * * *

"The Court: But you see, Mr. Gessler—you may be correct. But it seems to me the logic falls on its face. If it is true that this Court has had no jurisdiction, it has no jurisdiction today, and that therefore the U.S. Supreme Court can intervene. Then nothing I do will change that fact.

* * *

"The Court: The point I'm making is this, however: If the State of California has had no jurisdiction in this case, then there is nothing to prevent the U.S. Supreme Court from taking over this case on January 15th. Whatever I do, whatever the California Supreme Court does, all the U.S. Supreme Court has to do is issue an order to the California Supreme Court, to the Court of Appeal, and to the Department of Corrections and to me staying the execution of any further orders.

"Mr. Gessler: That, your Honor, is quite correct. My only problem would be whether or not if judgment is rendered all State remedies would have been exhausted or must be started anew before you can even reach the Supreme Court for that determination.

At the present time, prior to judgment, all those State remedies have been exhausted, so I would have no question but what the Supreme Court on the 15th could entertain the writ of certiorari and decide what to do.

"The Court: All right. Anything further?

"Mr. Gessler: No, your Honor.

"The Court: All right. The motion in the nature of a motion for an arrest of judgment will be denied. The motion for a continuance as to these proceedings on judgment and sentence will be denied." (App. A. pp. 5-7).

The petitioner was sentenced to the State Prison for the term prescribed by law which means five years to life.

REASONS FOR GRANTING WRIT

1. That specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment.

No one questions the fact that the Fourteenth Amendment was directed at the States and proclaimed that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws." Section 5, of the Amendment gave Congress the power to enforce, by appropriate legislation, the provisions of section 1 of the Amendment. Congress has exercised this power and enacted such appropriate legislation for such enforcement in sections 241, 242, Title 18, U.S.C.; section 1343, Title 28, U.S.C. and sections 1983-1985, Title 42, U.S.C. This Court has emphatically held that these Civil Rights statutes made and provided by the authority given to Congress by section 5 of the Amendment embrace "*all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States." And that there was no indication that the language of these sections was "confined to rights that are conferred by or 'flow from' the Federal Government as distinguished from those secured or guaranteed by the Constitution." *United States* v. *Price,* 383 U.S. 787. The Civil Rights statutes "dealt with Federal rights and with all Federal rights, and protected them in the lump." *United States* v. *Price,* supra; *United States* v. *Mosley,*

238 U.S. 383. Flack, in *The Adoption of the Fourteenth Amendment* (1908) 94 stated it correctly when he wrote: "Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification:

> "1. To make the Bill of Rights binding upon, or applicable to, the States.
>
> "2. To give validity to the Civil Rights Bill.
>
> "3. To declare who were Citizens of the United States."

Mr. Justice Black, dissenting with Mr. Justice Murphy, Mr. Justice Rutledge, and Mr. Justice Douglas in *Adamson v. California,* 332 U.S. 46 wrote that he "would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution." In the same case Mr. Justice Douglas wrote: "I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment." Since the Fifth Amendment is "specific" in its provision that "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," as the four dissenting Justices demonstrated, like the right against self-incrimination, it is "a constituent part of the Fourteenth Amendment." See, Fairman and Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan. L. Rev. 5 (1949). Considering the Fourteenth Amendment, the motives and objectives of the framers of that Amendment which must be considered at the time the Amendment was adopted, and the subsequent

enactment by Congress of the Civil Rights statutes, the bulwarks about the Bill of Rights have been strengthened and now the States are positively inhibited from impairing or abridging any Right enumerated therein, and so far as the provisions of the organic law can secure these rights they are, *all of them,* without exception, absolutely and completely secured. There can be no "selective process" or any judicial hack work cutting out some of these great rights. Some procedural rights contained in the Bill of Rights may be waived by a defendant, and these include the right to trial by jury or on indictment as "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." *Palko* v. *Connecticut,* 302 U.S. 319. But what may be true of trial by jury and on indictment is not true of the rights in the Bill of Rights against unreasonable searches and seizures, self-incrimination, *ex post facto* laws, bills of attainder, extorted confessions, or against being put in jeopardy for the same offense twice. As Mr. Justice Black said on the latter, "For I think double prosecutions for the same offense are so contrary to the spirit of our free country that they even violate the prevailing view of the Fourteenth Amendment, expressed in *Palko* v. *Connecticut.*" See dissenting opinions of the Chief Justice, Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Brennan, in *Bartkus* v. *Illinois,* 359 U.S. 157-170. No system of Justice would be possible without the substantial rights above outlined. The right against "Double Jeopardy" is a fundamental inalienable right, is not procedural, or second class, but belongs in the catalogue of indispensable freedoms.

It was the failure or refusal of the courts to recognize that the entire Bill of Rights was binding on the States that caused the terrible erosion in judicial determinations by giving a narrow and grudging interpretation. It was this erroneous and "same philosophy that produced *Betts* v. *Brady,* 316 U.S. 455, denying counsel to an accused in a state trial against the command of the Sixth Amendment and *Wolf* v. *Colorado,* 338 U.S. 25, allowing evidence obtained as a result of a search and seizure that is illegal under the Fourth Amendment to be introduced in a state trial. It is part of the process of erosion of civil rights of the citizen in recent years." *Rochin* v. *California,* 342 U.S. 165 (Mr. Justice Douglas, concurring). Concerning the "double jeopardy" clause in the Fifth Amendment, Brant stated the intention of Congress correctly when the Amendment was framed in *The Bill of Rights: Its origin and meaning,* (1965) when he wrote that: "The prohibition of double jeopardy for the same offense was so worded as to prevent a second trial of a person, who, though guilty, had been improperly convicted. A motion to revise the wording failed, but Congress switched later to the simple and more elastic guarantee of the Articles of Confederation: 'nor shall any person for the same offense be twice put in jeopardy of life and limb.'" When George Partridge of Massachusetts presented a motion at the time to add the words, "by any law of the United States" the motion was rejected. Such an addition would have implied that a person tried and acquitted under federal law could be later tried and convicted for the same offense in a state court. "The defeat of the Partridge Amendment stamps out every such double jeopardy as a perversion of the Constitution. * * * the one forbidding double jeopardy has to cover both federal and state courts in order to fulfill its declared purpose. Partridge's motion certainly would have

been adopted if Congress had shared his desire to open this loophole." Ibid. pp. 63-64. In the light of the common law as it existed at the time of the adoption of the Fifth Amendment and the intention of Congress as to the application of the Amendment, this Court must overrule its previous decisions in *Palko* v. *Connecticut,* 302 U.S. 319; *Hoag* v. *New Jersey,* 356 U.S. 464 and *Bartkus* v. *Illinois,* 359 U.S. 150, as it has overruled other anachronisms previously handed down on other fundamental rights. *Mapp* v. *Ohio,* 367 U.S. 643; *Katz* v. *United States,* ..... U.S. ....., No. 35, October Term 1967; *Gideon* v. *Wainwright,* 372 U.S. 335. The views of The Chief Justice, Mr. Justice Black, Mr. Justice Brennan, and Mr. Justice Douglas are, in *Bartkus* v. *Illinois,* 359 U.S. 150-170 consistent with the law of the land, the common law when the Fifth Amendment was adopted, and the intention of Congress when the Amendment was framed. The facts in this case offer an ideal opportunity for such adjustment.

2. There are three propositions on which a new trial may be allowed:

(a) If the trial was not on a valid indictment, or not before a court of competent jurisdiction. In these instances it can be reasonably argued that the defendant was never really in jeopardy, that jeopardy was apparent rather than real. Moreover, many courts even reject this rule and decide that jeopardy attached.

(b) If the defendant has consented to the discharge of the jury without a verdict, he is held to have waived his privilege and may not complain of a new trial.

(c) If the discharge of the jury is for a cause "beyond the control of the court"—or as it is more often put, due to "legal necessity" the case falls within the exception, and the prohibition against a second trial does not apply.

The early courts which worked out the doctrine also held that where a judgment was reversed (1) "To prevent a miscarriage of justice; or (2) the trial court had made an error in a matter of substance," no new trial can be had because the conviction is quashed. 9 Halsbury: Laws of England 273 (2d ed. 1933); 1 Bishop, Criminal Law, 771 (9th ed. 1923); *Regina* v. *Tancock,* 13 Cox C.C. 217, 220; *Vaux's Case* 4 Co. Rep. 44a, 45a; 1 Staund. P.C. 105, 106; Hawkins, Pleas to the Crown (7th ed. 1795)c. 35 sections 1, 9; Comyn Digest (4th ed. 1793) 526-527. In *People* v. *Phillips,* 51 Cal. Rptr. 225, the Supreme Court of California ruled that "The denial of defendant's right to a determination by the jury as to whether he acted with malice *resulted in a miscarriage of justice within the meaning of the California Constitution.*" And that the trial court had "made an error of substance" when "The instruction as rendered did not require the jury to find either express malice or the implied malice which is manifested in an intent with conscious disregard for life to commit acts likely to kill." The case is practically identical with *Regina* v. *Faulkner,* 13 Cox Crim. Cas. 550 (1877). See, also, *Regina* v. *Pembliton,* 12 Cox Crim. Cas. 607.

The constitutional purpose of the prohibition against double jeopardy was to eliminate the danger that experiment after experiment be made on the lives of men. The principle was well stressed in *In re Spier* (1828) 12 N.C. 329 at 333 that "If the prisoner had been found guilty, he must have suffered the penalties of the law. He was placed upon his trial; his life was in the hands of the jury. His breast was occupied by a commixture of hope and fear; it throbbed alternately with both." Some limit to it was sought to prevent this unfair harassing, and the State was to be bound by the errors of its officers and officials,

the prosecutors and the judges. The same principle was recently outlined by the opinion of Mr. Justice Black, announced by Mr. Justice Douglas in *Green* v. *United States*, 355 U.S. 184 at 187-188:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

There are factors in this case which were absent in the *Green* case. In the first instance the object sought to be accomplished was not primarily merely the conviction of the petitioner of murder in any degree but the complete destruction of the profession of chiropractic. The case reveals an outstanding example where the resources and power of the State were utilized to establish a precedent never before conceived "in the seven hundred years of Anglo-American law," rather than in due process of law, and for the sole purpose of gratifying the personal notions of the deputy district attorney that "The theory of chiropractic is a notion that no self respecting witch doctor in deepest Africa would entertain." (John W. Miner, Deputy District Attorney, Lawyers' Club, Los Angeles, Los Angeles Daily Journal, April 9, 1964). Many narrow minded bigots would say the same thing about many of the "fringe" medicines, or even Christian Scientists. Suppose the person who died had been a Christian Scientist and had been advised by a Christian Scientist not to undergo surgery, or by a Christian Scientist Practitioner, could not a similar criminal prosecution be instituted?

This is the great danger. Driven by the impetus of achievement in obtaining the first conviction on the felony murder doctrine, based on the felony of Grand Theft, the deputy district attorney broadcast his success to astounded audiences over the entire United States and on a personal tour to Europe with copious imagination over "'the first case in the history of the legal world of murder by words alone'' and during the time the appeal was pending. Now, when this imagined highly publicized accomplishment blew up in his face by the quashing of the conviction by the Supreme Court of California, a dangerous state of frustration was the consequence as the utterings were now at naught, and the victim of the frustration sought to procure some vindictive satisfaction by his failure to condemn and destroy the duly licensed profession of chiropractic, and demanded and was permitted, against the express clause of the Fifth Amendment "to take advantage of his own wrong," (*United States* v. *Ball,* 163 U.S. 662; *People* v. *Barrett,* 1 Johns (N.Y.) 66) on the claim that the ordeal of jeopardy can continue until this deputy district attorney comes up with a successful theory on which a valid judgment might be rendered, and that he has a right to another chance of convicting the prisoner, and so on, toties quoties. *Ibid.* The entire idea is preposterous. A prosecutor is not constitutionally entitled to exhaust his arsenal of theories by experimenting with them one at a time with jeopardy in each instance. This is what the Constitution expressly forbids: Trial by exhaustion. The powers and resources of the State are not available to overzealous or politically ambitious prosecutors to make repeated attempts to convict by subjecting a defendant as was the case here, to embarrassment, expense and ordeal, compelling such defendant to marshal resources and energies which he does not now have, for the endurance of

another harrowing ordeal, not because of the mistakes or conduct of the counsel for the defense, but because of the mistakes, incompetence, and inefficiency on the part of either the court or the prosecutor or both, and after compelling such defendant to live in a continued state of anxiety and insecurity affecting himself and his entire family as well as enhancing the possibility, that even if innocence exists, he may be found guilty, and to avoid such second ordeal, despite his innocence, he is compelled to take the choice between the cliff and the precipice and plead guilty, have no money to even pay counsel, and even if he had counsel of his own choosing to be compelled to accept the services of the Public Defender, as was the case here. This is the very antithesis of justice which the Fifth Amendment was designed to prevent. *Green* v. *United States,* 355 U.S. 184; *United States ex rel. Jones* v. *Nash,* 264 F. 2d 610; *Downum* v. *United States,* 372 U.S. 734.

3. In the first trial of the petitioner he was represented by able counsel of his own choosing as he was in a position to marshal sufficient resources to pay these attorneys, and if convicted to prosecute an appeal from the judgment. In substance, the only question involved in the case was one of law: could the felony of Grand Theft sustain a conviction for murder in the first or second degree under the felony murder doctrine?

While the indictment did not include a count charging grand theft, nor did it recite that the charge of murder would be prosecuted under this particular doctrine, this became evident when the prosecutor elected to abandon the charge as to the elements of first degree murder, and which for all legal purposes was a *nolle prosequi* of that particular element of homicide. On the motion of defense, both the court and the prosecutor agreed that the elements

of manslaughter as to any degree would also be abandoned and that the jury would be, and was, instructed not to concern themselves with these elements of homicide. This in law would be, and was, a *nolle prosequi* of the case as to these degrees of manslaughter as "A *nolle prosequi* is in the nature of an acknowledgement or undertaking by the plaintiff in an action to forbear to proceed any further either in the action altogether, or as to some part of it, or as to some of the defendants." Brown, Black's Law Dictionary, 4th ed. (1961) p. 1198. Had the petitioner been acquitted of murder in the second degree there could be no second trial. On this we can all agree. Both the Court of Appeal, in *People* v. *Phillips,* 232 Cal. App. 2d 594, and the Supreme Court of California in *People* v. *Phillips,* 51 Cal. Rptr. 225, agreed that the felony murder doctrine could not apply in this case and for all legal purposes the decisions of both courts were the equivalent to an acquittal. For this reason no new trial was ordered. This should have laid the case to rest for all time. So it can be seen that the task of counsel in the first trial was quite simple and boiled down to a single point in law.

On any second trial the case would be altogether different and both serious issues of both law and fact would be involved. *First*: it would be essential for the protection of the defendant's rights that a plea be entered in accordance with section 1017, subsections 3 and 4, of the California Penal Code that the former conviction was a bar to any second trial, and under section 1023 that:

> "When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included

> therein, of which he might have been convicted under that accusatory pleading."

And also under section 687 of the California Penal Code which provides that:

> "687. *Second prosecution for the same offense prohibited.*
>
> "No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted."

See, also, Ruling Case Law, p. 138. No defense attorney would fail or refuse to avail himself of these statutes providing for the protection of a defendant's constitutional rights if he had the interests of his client in his heart. If his motions were denied he could have sued for a writ of prohibition under the California Law. See *Gomez* v. *Superior Court,* 50 Cal. 2d 640; *Jackson* v. *Superior Court,* 10 Cal. 2d 350. Failure of any defense attorney to invoke these statutes enacted for the protection of the defendant herein under the facts in this case would be prima facie evidence of downright neglect.

Second: The world-wide utterings of the deputy district attorney who tried the case of the first jeopardy, and who intended to try it again, through various speeches, lectures and planned interviews or wide communications media, conventions, dinners and lawyers' clubs as previously referred to and which included his exclamations that "The theory of chiropractic is a notion that no self respecting witch doctor in deepest Africa would entertain," definitely warranted his disqualification as prosecutor in any second trial. If he refused to do so himself, this would have warranted a motion by defense counsel as to such disqualification which no trial court could validly deny under the conceded facts and circumstances in this case. Failure

to bring this matter before the court would indicate that such trial attorney was not interested in the rights of his client. In fact it militates against them, during the trial, and on any appeal if an adverse judgment was rendered against the defendant.

Third: The defendant was also confronted with a very serious problem somewhat analogous to that described by George Bernard Shaw in *The Doctor's Dilemma* written over 50 years ago. The defendant was a member of a profession which has been repeatedly classified as medical quackery by the American Medical Association and as an "unscientific cult" and a "hazard to the health of the American people" in its medical journals, and he was slated for a conviction for the crime of murder in the first or second degree solely on the "expert" opinion of a member of the American Medical Association who is dedicated to the philosophy expounded by the Association, and which, through formal or informal, and betimes express ethical regulations imposed by the Association, compelled to testify accordingly, or suffer suspension or exclusion from the Association. Moreover, this testimony, in order to avoid conviction of murder must be successfully rebutted, not by testimony by members of the school of medicine to which the defendant belonged and duly licensed by State referendum of the People of California to practice this profession, but by members of the school of medicine which his profession is despised as quackery and an "unscientific cult." Moreover doctors of the orthodox medical profession who would testify in favor of the defendant would render them subject to expulsion from the Medical Societies or the American Medical Association to which they belonged, and to which they must belong if they want hospital facilities or other privileges

for their patients. This would be the same if the defendant was a Christian Science Practitioner or a Jehovah's Witness, or any other unorthodox profession who claim to cure or help in sickness. Only when the so-called "unscientific cult" has some religious connotations will it have a chance of immunity from such prosecution. Shaw put it thus in his *The Doctor's Dilemma*:

"THE PECULIAR PEOPLE

"Besides, the calling in of the doctor is now compulsory except in cases where the patient is an adult and not too ill to decide the steps to be taken. We are subject to prosecution for manslaughter or for criminal neglect if the patient dies without the consolations of the medical profession. This menace is kept before the public by the Peculiar People. The Peculiars, as they are called, have gained their name by believing that the Bible is infallible, and taking their belief quite seriously. The Bible is very clear as to the treatment of illness. The Epistle of James, chapter v., contains the following explicit directions:—

"14. Is any sick among you? Let him call for the elders of the Church; and let them pray over him, anointing him with oil in the name of the Lord:

"15. And the prayer of faith shall save the sick, and the Lord shall raise him up and if he have committed sins, they shall be forgiven him.

"The Peculiars obey these instructions and dispense with doctors. They are therefore prosecuted for manslaughter when their children die.

"When I was a young man, the Peculiars were usually acquitted. The prosecution broke down when the doctor in the witness box was asked whether, if the child had had medical attendance, it would have lived. It was, of course, impossible

for any man of sense and honor to assume divine omniscience by answering this in the affirmative, or indeed pretending to be able to answer it at all. And on this the judge had to instruct the jury that they must acquit the prisoner. Thus a judge with a keen sense of law (a very rare phenomenon on the Bench, by the way) was spared the possibility of having to sentence one prisoner (under the Blasphemy Laws) for questioning the authority of Scripture, and another for ignorantly and superstitiously accepting it as a guide to conduct. Today all this is changed. The doctor never hesitates to claim divine omniscience, nor to clamor for laws to punish any scepticism on the part of laymen. A modern doctor thinks nothing of signing the death certificate of one of his own diphtheria patients, and then going into the witness box and swearing a Peculiar into prison for six months by assuring the jury, on oath, that if the prisoner's child, dead of diphtheria, had been placed under his treatment instead of that of St. James, it would not have died. And he does so not only with impunity, but with public applause, though the logical course would be to prosecute him either for the murder of his own patient, or for perjury in the case of St. James. Yet no barrister, apparently, dreams of asking for the statistics of the relative case-mortality in diphtheria among the Peculiars and among the believers in doctors, on which alone any valid opinion could be founded. The barrister is as superstitious as the doctor is infatuated; and the Peculiar goes unpitied to his cell, though nothing whatever has been proved except that his child died without the interference of a doctor as effectually as any of the hundreds of children who die every day of the same disease in the doctor's care.

> "On the other hand, when the doctor is in the dock, or is the defendant in an action for malpractice, he has to struggle against the inevitable result of his former pretences to infinite knowledge and unerring skill. * *.
>
> "Fortunately for the doctors, they very seldom find themselves in this position, because it is so difficult to prove anything against them. The only evidence that can decide a case of malpractice is expert evidence: that is, the evidence of other doctors; and every doctor will allow a colleague to decimate a whole countryside sooner than violate the bond of professional etiquet by giving him away. * * Now and then some doctor in an unassailable position, like the late Sir William Gull, will go into the witness box and say what he really thinks about the way a patient has been treated; but such behavior is considered little short of infamous by his colleagues."

See, also, California Malpractice Controversy, 9 Stan. L. Rev. 731; Lambert, M.D., Conspiracy of Silence of Medical Profession, N.A.C.C. L. Jour. 30 pp. 93-97; Wylie, M.D., Conspiracy of Silence, 29 Medical Economics 167 (1952).

The "Peculiars" have now been joined by such duly licensed professions as Naturopathy, Herbalism, Homeopathy, Osteopathy, Chiropractic, Acupuncture, Yoga, Psychotherapy, Hynotherapy, Autosuggestion, Christian Science, Jehovah's Witnesses, Healing, Radiesthesia, and others, and all condemned as "unscientific cults" by orthodox medicine the purveyor of drugs and surgery as the only remedies for the ills of man. But see to the contrary, *School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94; Brian Inglis, *The Case for Unorthodox Medicine* (1965), G. P. Putnam's Sons, New York. But now they must be judged by their adversary, Orthodox Medicine.

It would seem that the advice of Benjamin Rush, M.D., Surgeon General of the United Continental Army of the United States and Signer of the Declaration of Independence should be seriously considered that "The Constitution of this Republic should make special provision for Medical Freedom as well as Religious Freedom. * * To restrict the art of healing to one class of men and deny equal privileges to others will constitute the Bastille of medical science. All such laws are un-American and despotic. They are fragments of monarchy and have no place in a Republic."

When counsel was regularly retained by the defendant in September 1967 to investigate the facts of the case, and the law applicable, in order to protect the defendant's rights, the record revealed a total absence of necessary pre-plea and pre-trial motions which are designed to assure the protection of these rights. The defendant, on the indictment as drawn, could be tried for his life on murder in the first degree, that is, if the court had the jurisdiction to try him at all. In the light of *Green* v. *United States,* 355 U.S. 184, this was doubtful to say the least, and in the light of the common law when the Fifth Amendment was adopted, there could be no second trial. If the grand jury found the indictment on the basis of instructions as to the felony murder doctrine, the indictment would have to be dismissed as, prima facie, it would not "warrant a conviction by a trial jury" under section 938-8, California Code, because such instructions would have misled the grand jury to believe that it was sufficient to find the defendant committed Grand Theft. The investigation of the record revealed there had been no attempt whatever on the part of the Public Defender, nor had he given any thought to the matter of procuring "expert" medical testimony in behalf of the defendant very vital to this case.

On October 23, 1967, Mr. Charles L. Abrahams, attorney from Los Angeles was added as counsel to aid in the prohibition proceedings and if a trial must be had, to conduct the defense. On this date the trial court denied Mr. Abrahams' argument and written motion to be substituted into the case and replace the Public Defender. Under the California practice Mr. Abrahams could not even actively associate or assist in the trial while the Public Defender was given control. *People* v. *Mattson,* 336 P. 2d 937; *People* v. *Saltz,* 131 Cal. App. 2d 459; *People* v. *Kerfoot,* 184 Cal. App. 622; *People* v. *Lanigan,* 22 Cal. 2d 569. Only as counsel of record in any criminal trial could he protect the defendant in his constitutional and statutory rights. Moreover, what aggravated the situation was the fact that Mr. Abrahams had available to him "expert" medical testimony for the defense through the Scientific Research and Civil Rights Foundation. Undoubtedly, Mr. Abrahams, as counsel for defendant, would have asked the court to be permitted to have the plea of not guilty withdrawn in order to make the necessary pre-pleading motions, and motions which must be made at the time a plea is entered, and which the Public Defender had neglected to do. Under the circumstances the trial would be over when the People rested as the Public Defender had nothing to offer.

At this point in the trial the matter arose as to whether the defendant should or should not take the stand in his own defense, a decision which no layman can make without the advice of counsel of his own choosing in the light of the California constitutional provision in Article 1, section 13 which permits comments on his failure to do so, and which is unconstitutional under the provisions of the Fourth Amendment notwithstanding the ruling of this Court in *Adamson* v. *California,* 332 U.S. 46, and

Twining v. *New Jersey,* 211 U.S. 78 which must be overruled. Even the trial court admitted that this "area is very gray area in terms of the constitutional rights of the defendant". (App. p. 24). The record reveals a long discussion on the subject (App. pp. 23-31), a part of which is as follows:

> "The Court: This area is a very gray area in terms of the constitutional rights of the defendant. * * . (App. p. 24)
>
> "* * *
>
> "The Defendant: I would like to ask you this, your Honor: As far as—I understand what my rights under the Fifth Amendment are.
>
> "The Court: Yes.
>
> "The Defendant: But I certainly wouldn't want to waive anything by understanding that right at the moment.
>
> "The Court: All right. What you are saying is that you feel you have been deprived of your right to counsel under the Sixth Amendment.
>
> "The Defendant: Or whatever the amendment is.
>
> "The Court: Yes, that's the Sixth.
>
> "The Defendant: I don't know.
>
> "The Court: And that being the case, you do not wish to make any statement as to the waiver of your rights under the Fifth Amendment?
>
> "The Defendant: I do not want to waive any rights at this time, your Honor. (App. p. 30)
>
> "* * *
>
> "The Defendant: Well, I would like to reiterate again that I did want Mr. Charles Abrahams as my attorney at the beginning and the Court did not grant that to me. Instead, they made me—the Court made me have Mr. Gessler as my attorney, as you know.
>
> "The Court: Yes.
>
> "The Defendant: As to the various continuances that the Court put into the record, of course, we have found that only—that we—we, I, the defendant, just

made four continuances. The rest we have found to be made by either the Court or the Deputy District Attorney at the time.

"The Court: Now, all that is quite clear in the record. Your position is clear. * * (App. p. 29)

"* * *

"The Court: All right. Anything further, Mr. Phillips, or Dr. Phillips?

"The Defendant: Well, your Honor, I don't know what Mr. Abrahams would have done had I had him as counsel.

"The Court: All right. You wish, then, to stand on that statement?

"The Defendant: Yes, I do, your Honor."

CONCLUSION

The QUESTIONS INVOLVED in this petition are both clear and fundamental. We agree with the conclusions of the trial court that if it did not have jurisdiction in the first instance or lost jurisdiction by the denial of the constitutional right to counsel, it does not have any jurisdiction now and that "all the U.S. Supreme Court has to do is issue an order to the California Supreme Court, to the Court of Appeal, and to the Department of Corrections and to me staying the execution of any further orders" (p. 11 *supra*). For the reasons heretofore outlined in this petition the writ of certiorari should be granted.

Respectfully submitted,

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February 9, 1968.

APPENDIX

UNITED STATES CONSTITUTION

Fifth Amendment

"* * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * *"

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment

"Seetion 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CALIFORNIA CONSTITUTION

Article 1, section 13

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court, and may be considered by the court or the jury. *"